No. 15582

United States
Court of Appeals
For the Ninth Circuit

UNION PACIFIC RAILROAD COMPANY,
a corporation,
Appellant,

vs.

ORE-IDA POTATO PRODUCTS, INC.,
a corporation,
Appellee.

Brief for Appellee

Appeal from the United States District Court
for the District of Oregon

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INDEX TO AUTHORITIES

TOPICAL INDEX

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STATEMENT OF THE CASE

The Appellant makes only two Specifications of Error and we will discuss them in the same order as discussed in their brief. The Statement of the Case, Jurisdiction, Facts, Issues and Record on Appeal are well stated by the Appellant and we take no exception to them.

SPECIFICATION OF ERROR I

Summary of Argument

1. Motion of Summary Judgment was properly refused.

2. Cardinal rules of construction are:

   (a) Any doubt or ambiguity is to be resolved in favor of shipper.

   (b) If two rates are equally applicable the shipper is entitled to the lower of the two.

   (c) If there are two rates applicable, one being more specific, the specific will control over the general.

3. Comparison with Fair Labor Standards Act and Motor Transport Act.

4. Substantial identity.

5. Killing enzymes is not cooking.

6. Comparison of french fries with other products of Appellee.

7. Definition of words under Tariff Item 4600 and 4715.

AUTHORITIES

United States vs. Strickland Transp. Co., Inc. 200 Fed. (2) 234

Willingham vs. Seligman, 179 Fed. (2) 257

U. S. vs. Gulf Refining Co., 69 L. E. 1082

Buch Express vs. United States, 132 Fed. Sup. 473

West Coast Products Corp. vs. Southern Pacific Co., 226 Fed. (2) 830

Baltimore & Ohio R. Co. vs. Owens-Illinois Glass Co., 133 Fed. Sup. 680
Louisville & N. R. Co. vs. United States, 109 Fed. Sup. 464
Atchison, Topeka & Santa Fe Ry. Co. vs. Simpson, 109 Fed. Sup. 616
McComb vs. Hunt Foods, 167 Fed. (2) 905
Hendricks vs. DiGiorgio Fruit Co., 49 Fed. Sup. 573
Mitchell vs. Oregon Frozen Foods Co., 145 Fed. Sup. 157
East Texas Motor Freight Lines vs. Frozen Food Express, 100 L. E. 917
Home Transfer & Storage Co. vs. United States, 141 Fed. Sup. 599
Frozen Food Express vs. United States, 148 Fed. Sup. 399
Motor Cargo vs. United States, 124Fed. Sup. 370

ARGUMENT

Motion of Summary Judgment was properly refused

This Specification deals with the refusal of the Court to grant Appellant's Motion for Summary Judgment. The most obvious answer to this is the fact that the Court did not feel that the plaintiff was entitled to judgment, either summary or otherwise. It is a Motion for Summary Judgment in favor of the plaintiff and if the merits did not warrant a judgment for plaintiff such Motion was properly denied. We will discuss the merits further along in the brief. The authorities set out under this first Specification on pages 8, 9 and 10, state the general law relative to the duty of the Court to construe the tariff. However, the fact that the construction of a

tariff is a matter of law does not indicate the issues are to be determined on a motion for summary judgment. The Appellant did not submit any testimony and therefore all the facts are conceded and it became a question of law based upon the testimony and pre-Trial Order for determination by the Court. The testimony that was submitted was simply in amplification and further explanation of the facts set out in the Pre-Trial Order. It was not introduced for the purpose of introducing expert testimony nor to prove any peculiar uses in a trade or locality.

Cardinal Rules of construction.

United States vs. Strickland Transp. Co., Inc., 200 Fed. (2) 234 at 235:

> "We think this is so, too, because, if it be considered that the shipment could come under either of the two classifications, the shipper was entitled to the 'Machinery or Machines' classification because the rate prescribed by it is the lower. * * * If it could be considered that there is an ambiguity in the tariff and is not made clear under which rating the articles shipped come, the ambiguity must be resolved in favor of the shipper, and the lower rate must be awarded to him."

Willingham vs. Seligman, 179 Fed. (2) 257 at 258:

> "In general there is nothing peculiar about the canons of construction in dealing with freight tariffs. They are interpreted in much the same way as contracts and statutes. Where general and specific provisions overlap, the specific is deemed to be an exception to the general rule.

Ambiguities are resolved against the carrier and in favor of the shipper. The shipper is entitled to the lowest published rate properly covering his tendered shipment."

U. S. vs. Gulf Refining Co., 69 L. E. 1082 at 1085:

"Where a commodity shipped is included in more than one tariff designation, that which is more specific will be held applicable. (citing) And where two descriptions and tariffs are equally appropriate, the shipper is entitled to have applied the one specifying the lower rates. (citing) It follows that, if the property in question properly might have been described either as gasoline or as unrefined naptha, the lower grade was lawfully applied, and defendant was not guilty. And the burden was on the United States to prove beyond a reasonable doubt that the property so shipped was gasoline, and was not unrefined naptha."

Buch Express vs. United States, 132 Fed. Sup. 473 at 476:

"Even were the two descriptions and tariffs equally appropriate, the shipper is entitled to have applied the one specifying the lower rates." (citing)

West Coast Products Corp. vs. Southern Pacific Co., 226 Fed. (2) 830 at 832:

"Unquestionably, if the shipment could be included in more than one tariff designation, it would be proper to select the item more specifically applicable to the product being transported. If there were two tariff descriptions equally ap-

propriate, West Coast, as shipper, would be entitled to the lower rate."

Baltimore & Ohio R. Co. vs. Owens-Illinois Glass Co., 133 Fed. Sup. 680 at 702:

"It seems to be the law that where a commodity is included in more than one tariff designation, that which is more specific will be held applicable."

Motor Cargo vs. United States, 124 Fed. Sup. 370 at 371:

"Frequently the tariffs filed with the Interstate Commerce Commission do not specifically describe the article carried, but the rule is that the classification which comes nearest to a description of the article carried determines the rate to be collected, if it can fairly be said that the article comes within that classification. (citing) Gun controls or power drives are not specifically named in any tariff filed by the carrier with the Interstate Commerce Commission."

Louisville & N. R. Co. vs. United States, 109 Fed. Sup. 464 at 467:

"Where two or more classifications appear to be equally applicable, the shipper is entitled to have applied the lower classification. (citing)"

Atchison, Topeka & Santa Fe Ry. Co. vs. Simpson, 109 Fed. Sup. 616 at 617:

"The shipper contends that where two provisions

of a tariff are equally appropriate it is entitled to have applied the one specifying the lower rate. The parties also differ as to whether there is an ambiguity in the published tariffs, the shipper relying upon the rule that in the event of ambiguity the doubts are to be resolved in its favor while the carrier, although recognizing the rule, says it is inapplicable."

As applied to this case, if there is any doubt in the mind of the trier of the facts as to whether french fried potatoes are cooked food or frozen vegetables, those doubts should be resolved in favor of the shipper. We are dealing with a product here to which heat has been applied but there is very serious question as to whether this application of heat cooks the potato. This doubt likewise should be resolved in favor of the shipper.

We do not concede that Item 4600 is in any way appropriate for french fried potatoes. On the other hand if the Court felt that it did apply, then it is even more clear that Item 4715 also applies. There can be no question but what a french fried potato is a vegetable, nor that it is a fresh vegetable, and there can be no doubt that it is frozen. The french fried potato fits every word contained in the description under Item 4715. Therefore, if it could be considered as coming under both of the classifications, the Appellee is entitled to Item 4715, that being the lower of the two rates.

Again if we concede for the purpose of argument,

that french fried potatoes are properly classified under Item 4600 as well as Item 4715, then under the above authorities Item 4715 is the proper classification for the reason it is more specific than Item 4600. The latter classification includes all kinds of cooked food as well as cured foods or preserved foods which are frozen. It would cover a great volume of articles which in the present day market are cooked and frozen. On the other hand Item 4715 is much more specific, it is limited to vegetables. It could not be applicable to meat, poultry, fish, pies, dinners or ice cream. It is limited strictly to vegetables. Vegetables is of course much more specific than food. Food is the general term which of course includes vegetables but vegetables is a more specific designation of a type of food.

Comparison with Fair Labor Standards Act and Motor Transport Act.

There is a close similarity between the question under consideration and the questions which have arisen under the Fair Labor Standards Act. There is also a close similarity between this case and cases arising under the Motor Transport Act. We will discuss the cases under these two items. Under the Fair Labor Standards Act there were certain exemptions by reason of first processing of agricultural commodities. First processing is usually those first things that are done to vegetables in preparing them for

narket. Generally, it is the process of preparing or preserving the fresh vegetable for market. If a product were cooked it would include more than first processing. Stated otherwise, cooking goes over and beyond what the courts have determined to be first processing.

McComb vs. Hunt Foods, 167 Fed. (2) 905 at 907:

> "Was appellee engaged in 'first processing' within the meaning of the statute? The word 'process' by definition means a series of acts, and the test of when 'first processing' ends is obviously not when the first act performed upon the fruit is done (it might well be first processed' by a preliminary washing of the apples if this view was sound). A more rational view suggests the conclusion that the sum of several operations may well constitute a 'process' or 'processing'. The cutting and peeling admittedly does not end the first processing of the major part of the apple which is later dehydrated, yet appellant maintains that the first processing (so far as the peels and cores are concerned) has ended at this point, while these parts of the apples have in fact not yet been 'processed' in any manner and have yet to be converted into juice or pomace. This argument does not appeal to us."

Hendricks vs. DiGiorgio Fruit Co., 49 Fed. Sup. 573: (575)

> "If 'first processing' does not mean the processing that first results in a marketable product, where is the line to be drawn? It is true that the wine or brandy making process may be broken down

> into component processes or operations, and that these, in turn, may be broken down still further. But the same thing is true of any other process, as, for example, the production of dried and frozen fruits and vegetables, condensed, evaporated and dried milk, butter, cheese, dried eggs, and flour, all of which, the Administration has held, fall within the exemption. Obviously, first processing does not end at some arbitrarily chosen point in the midst of the wine or brandy making process, any more than it ends at such a point in the cheese making process. The stipulated facts show that when the crushing season starts defendant's operations are a continuous processing of the fresh grapes that cannot be halted at any point prior to completion. To choose one of the early steps in such continuous process and say this and no more constitutes first processing would be arbitrary and unwarranted."

In *Mitchell vs. Oregon Frozen Foods Company*, 145 Fed. Sup. 157, it was conceded by the Government that these same french fried potatoes were included in "first processing". The exception involved was Section 213 (a) (10) of the Fair Labor Standards Act of 1938, 29 USCA 201 et seq.

> "Any individual * * * engaged in * * * preparing in their raw or natural state * * * agricultural or horticultural commodities for market."

If the potatoes were being "prepared in their raw or natural state" they certainly were not a "cooked food."

The Oregon Frozen Foods Case is, however, presently on appeal, but this point is not involved in the appeal, as the Government conceded that these french fried potatoes were exempt under this "first processing" clause.

Substantial Identity

The controlling factor in the question is whether or not a product loses its substantial identity in the process. In other words, is the product substantially the same product that it was at the beginning. Otherwise stated, does the product change from the original product into some different product?

In *East Texas Motor Freight Lines vs. Frozen Food Express*, 100 L. ed. 917 the Court dealt with "substantial identity" saying: (924 L. ed. cit.)

> "A chicken that has been killed and dressed is still a chicken. Removal of its feathers and entrails has made it ready for market. But we cannot conclude that this processing which merely makes the chicken marketable turns it into a 'manufactured' commodity.
>
> At some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been 'manufactured' within the meaning of §203 (b) (6)."

This was followed in *Home Transfer & Storage Co.*

vs. United States, 141 Fed. Sup. 599, which included the same general process that we are dealing with here. The Court said: (602)

> "The processing of fresh fruits for quick freezing in this case is essentially nothing but adding sugars, sirups, and as to peaches ascorbic acid, to better preserve the fruits and improve their color and taste. Nothing but slicing of the fruit affects its physical form. The processing of fresh vegetables for quick freezing is to heat them, in some instances after first splitting them to hasten heat action, sufficiently to kill the enzymes, and then to follow with the desired degree of freezing. Although this process may produce noticeable discoloration, or may divide a stalky variety into two or more parts, nothing is done to otherwise change the form of the vegetables. In other respects than those mentioned, these processed fruits and vegetables remain essentially in the same shape and form as non-processed fruits and vegetables.
>
> Such results of the processing here make applicable to the facts of this case the above quoted Supreme Court statement in its April 23, 1956 decision that:
>
> 'But where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been 'manufactured' within the meaning of §203 (b) (6).'"

Counsel cite the case before the Interstate Commerce Commission of W. W. Hughes Extension-Frozen Foods, M.C. 105783 Sub. (3) wherein the Com-

mission held certain items to be manufactured. The list includes frozen french fried potatoes, frozen eggs, frozen egg yolks, etc.

However, the last expression of any court on this question that we have discovered is *Frozen Food Express vs. United States*, 148 Fed. Sup. 399 (Dec. 1956). That was an action to restrain the Commission from enforcing its report defining certain items being manufactured. The list included among others frozen whole eggs, dried egg powder, dried egg yolks, fruits and vegetables (quick frozen). In holding the items we enumerate along with many others as not being manufactured, the court said at page 402-3:

> "Our holding that fresh and frozen dressed poultry was exempt was affirmed, 351 U. S. 49, 76 S. Ct. 574, 577, wherein the Supreme Court announced the so-called 'continuing substantial identity' test, quoting from Anheuser-Busch Brewing Ass'n v. U.S. 207 U.S. 556, at page 562, 28 S. Ct. 204, 52 L. Ed. 336:
>
> " * * * Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor, and manipulation. But something more is necessary, as set forth and illustrated in Hartranft v. Wiegmann, 121 U. S. 609, 7 S. Ct. 1240, 30 L. Ed. 1012. There must be transformation; a new and different article must emerge, 'having a distinctive name, character, or use.' "
>
> * * *

"With this background, the following commodities, of agricultural origin, having undergone some processing but retaining their original identity, we hold exempt: frozen whole eggs; dried egg powder; dried egg yolks; clean rice; rice bean; rice polish; pasteurized milk; fresh cut up vegetables in cellophane bags; fresh vegetables washed, cleaned and packaged in cellophane bags or boxes; fruits or vegetables (quick frozen); shelled peanuts; peanuts shelled ground; killed and picked poultry (although not drawn); rolled barley; cottonseed hulls; beans (packed, dried artificially or packed in small containers for retail trade); dried fruits (dried mechanically or artificially); peaches peeled, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk, skimmed, vitamin D; milk, powdered; buttermilk; feathers; frozen milk and cream; cotton linters; chopped hay; seeds, deawned or scarified; redried tobacco leaves."

Those items that do lose their continuing substantial identity were: Commercial creamery products including cottage cheese, cream cheese and butter; cottonseed meal, canned fruits and vegetables, condensed milk.

Butter, cream cheese and cottage cheese cannot be identified as milk but frozen french fried potatoes certainly can be identified as potatoes.

A frozen french fry is identified as the original product, it has acquired no new "identity" has no "new properties" and is not devoted to any or different uses than its original principal ingredient. If these potatoes were converted or manufactured into

potato starch, or if the corn was made into corn-starch, then they would lose their substantial identity. But here we have a potato that is sliced, blanched (to kill enzymes) and frozen and as such retains its substantial identity.

Killing enzymes is not cooking.

Water blanching for a minute and one-half is not sufficient to kill the enzymes and it is necessary to blanch them in water longer or to blanch them in oil to kill the enzymes. Paragraph XI of the Pre-Trial Order states that the purpose of oil blanching "was to kill the enzymes in the raw potato and to stop bacterial decay." (R. 13 and 14) Mr. Gheen testified "The purpose of blanching is to inactivate the enzymes" (R. 34) and "the only other purpose would be to coat the product with oil." (R. 35)

Comparison of french fries with other products of Appellee.

It is interesting to note that all other vegetables processed at Appellee's plant are classified under Item 4715 of the tariff. (R. 40) They include corn, carrots, lima beans, string beans, and potatoes in various forms, i.e., french cuts, potato patties, diced potatoes. (R. 40 and 34)

They all go through the same general processing. (R. 33) The only difference is the time of blanching and the medium. Some vegetables take a longer time than

others. Where oil is used as a blanching agent the water blanch timing is shortened.

Definition of words under Tariff Item 4600 and 4715.

Appellant quotes Webster's New International Dictionary for a definition of "cook".

"Made suitable for eating." (Ap. Br. 11)

The testimony is: "This product, if you took a package out and simply thawed it out to get rid of the freezing would it be a palatable product? A Well, yes and not. You could swallow it, but it is not healthy so to do." (R. 36) Certainly it would not be "suitable for eating."

As to "curing" the same dictionary says to preserve by drying, salting, etc. (Ap. Br. 12) It takes no citation of authorities to establish that these french fried potatoes are not "cured". This would apply to salt pork, jerked venison or smoked hams or bacon.

As to "preserve" the dictionary says: "To save from decomposition by freezing." By definition frozen vegetables come under Item 4715 so that portion of the definition is not indicative of Item 4600. The balance of the definition is "curing or treating with a preservative."

"Curing" already is eliminated under the above and there is no testimony that any "preservative" is added to the potatoes.

The oil blanch is not a preservative and is not used for that purpose. Its purpose is to kill the enzymes

and to furnish the oil that expedites the cooking of the potatoes when the user receives them. It avoids the necessity of adding oil if baked in the oven and cuts down on the oil required in the deep fat fryer of the housewife or restaurant cook.

Under Webster's definition these potatoes are neither "made suitable for eating", "cured", or "preserved".

Turning now to the language of Item 4715 first the product is a vegetable. It is either cooked or it is fresh. All other vegetables processed by Appellee are classified as frozen fresh vegetables. If a frozen french cut is a frozen fresh vegetable and that is admitted, then a frozen french fry is a fresh vegetable. The french cut is not cooked and the housewife follows the same cooking instructions if the deep fat fry method is used. If the oven method is used, the first two or three minutes is necessary to defrost and warm the potato, the rest of the 10 to 25 minutes is for cooking the potato. (R. 36)

Comparing the cooking time of the oil blanched potato with other frozen products shipped under Item 4715 we find mixed vegetables require 15 to 18 minutes, the potato patty from 10 to 25 minutes, kernel corn 6 to 8 minutes. Obviously the frozen oil blanches, or what is commonly called french fry, must be cooked by the housewife before it is made "suitable for eating" or before it is "cooked". If it is not a "cooked food" it cannot be classified under Item 4600.

Appellant attempts to limit the significance of the cases dealing with "raw or natural state" by stating that the reasons for those rulings are not present in this case. This is answered by the long line of cases establishing the preferred position of the shipper as against the carrier, i.e., shipper entitled to the lower of two equally applicable rates, doubts or ambiguities resolved in favor of shipper, the more specific rate controls the more general. We also feel that farm products should command a lower rate than "cooked foods". All the reasons set forth in the Fair Labor Standards cases and the Motor Freight cases apply with a particular vigor here. Why should oil blanched potatoes be required to bear a higher rate than other products handled in the same identical manner by the carrier? There is no logical distinction.

SPECIFICATION OF ERROR II

Summary of Argument

1. Invoking the doctrine of primary jurisdiction is discretionary.

2. Where there is no dispute as to the facts there is no occasion to invoke the doctrine.

3. Where there is no trade term or technical language used there is no occasion to invoke the doctrine.

4. The admission of testimony ipso facto does not require or indicate that the doctrine be invoked.

5. Interstate Commerce Commission possesses no better means, method, or knowledge to determine the question than the Court does.

6. Many courts have dealt directly with much more complicated and technical questions than are presented here and decided the issue without invoking the doctrine.

AUTHORITIES

Texas & P. R. Co. vs. Abilene Cotton Oil Co. (1906) 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553.

Baltimore & Ohio R. Co. vs. Owens-Illinois Glass Co. 133 Fed. Sup. 680.

Great Northern R. Co. vs. Merchants Elevator Co. (1922) 259 U. S. 285 (290, 291, 292) 66 L. E. 943

United States vs. Western P. R. Co., 1 L. Ed. (2) 126 (Vol. 1 U. S. Adv. Sh. Dec. 17, 1956)

United States vs. Chesapeake and Ohio R. Co. 352 U.S. 1 L. Ed. (2) 140 (Adv. Sh.) 77 S. Ct.

Norge Corp. v. Long Island R. Co., 77 Fed. (2) 312

ARGUMENT

This specification involves the question of whether or not this is an appropriate case to invoke the doctrine of primary jurisdiction.

Otherwise stated, is there such a controversy over the facts, or is the question so highly technical, that it would be advisable to refer the question to the Interstate Commerce Commission for examination,

hearing, and determination. Or, should the trial court hear the cause in the first instance and make its own determination.

The doctrine had its genesis is *Texas & P. R. Co. vs. Abilene Cotton Oil Co.* (1906) 204 U. S. 426, 27 St. Ct. 350, 51 L. Ed. 553.

It was an action in a state court to recover alleged overcharges on the ground the charges were excessive, unreasonable and unjust. The rates had been published under the provisions of the Interstate Commerce Act. Mr. Justice White said: (p. 562 L. Ed)

> "Concluding, as we do, that a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable."

It has been cited, followed and distinguished in a great number of cases since 1906 down to 1954 in *Baltimore & Ohio R. Co. vs. Owens-Illinois Glass Co.*, 133 Fed. Sup. 680, where the court referring to Texas & P. R. Co. vs. Abilene Cotton Oil Co. said at page 690:

> "The court in that case established the so-called 'primary jurisdiction' doctrine, which has been referred to as an excellent example of judicial

legislation (Davis on Administrative Law, page 665, 1951), holding that a shipper cannot maintain an action at common law in a state court for excessive and unreasonable freight rates on interstate shipments where the rates charged were those which had been duly fixed by the carrier according to the Act and had not been found to be unreasonable by the Interstate Commerce Commission."

Great Northern R. Co. vs. Merchants Elevator Co. 1922) 259 U. S. 285, 291, 292. In a suit to recover lleged overcharges Mr. Justice Brandies in speaking f the necessity of invoking the doctrine of primary urisdiction said: (66 L. Ed. 946)

"This argument (for uniformity) is unsound.

* * *

Whenever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. * * *

Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to

> be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute."

And at page 948:

> "In the case at bar the situation is entirely different from that presented in the American Tie & Timber Co. Case, or in the Loomis Case. Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense, and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary."

These cases reveal that the use of the doctrine is discretionary and only when it serves a good purpose. It certainly is not mandatory or it would necessarily be used in all similar cases. *United States vs. Western P. R. Co.*, 1 L. Ed. (2) 126 at 135: (Vol. 1 U. S. Ad. Sh. Dec. 17, 1956)

> "By no means do we imply that matters of tariff construction are never cognizable in the courts. We adhere to the distinctions laid down in Great Northern R. Co. vs. Merchants Elevator Co. (US) supra, which call for decision based on the particular facts of each case."

As appellant points out in a number of instances there is no dispute as to the facts. The railroad did not introduce any rebuttal testimony and all testimony stands undenied. Under such circumstances it is the province of the court to interpret the language of the tariff as it would the language of any statute.

There seems to be some implication that if no testimony is received then the doctrine of primary jurisdiction is not appropriate but if any testimony is introduced it immediately becomes necessary to suspend the trial and refer the matter to the Interstate Commerce Commission. We do not so read the cases. It is only where there are contested issues of fact, highly technical matters of science or rate making, or the peculiar usages of trade or locality that the doctrine is invoked. Certainly none of these elements were present in the case under consideration.

The short testimony here was of the same nature as was introduced in West Coast Products Corp. vs. Southern Pacific, 226 Fed. (2) 830 (9th Circuit May, 1955). That also was an action by the railroad to recover claimed additional freight charges. It involved simply the question of which of two items of a freight tariff was applicable to the shipment of certain olives. The testimony was all uncontradicted and described the method of processing the olives. The court did not invoke the doctrine but decided it as a matter of law after withdrawing the issue from

the jury. The similarity between these two cases is striking.

United States vs. Western Pac. R. Co. 77 S. Ct. 161, 1 L. Ed. (2) 126. This is a striking example of where the doctrine should be applied and where it should not be applied. There is a vast difference between an incendiary bomb and a potato. None of the intricate questions involved there are present in this case. This case presents only questions of common ordinary everyday matters. It does not require a body of experts in transportation to determine when a potato is cooked. Every housewife in the land knows that.

The Court said: (132)

> "No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation."

In the very recent case of *U. S. vs. Chesapeake & Ohio R. Co.*, 352, U. S., 1 L. Ed. (2) 140 (Adv. Sh.) 77 S. Ct. which was decided the same day as the Western Pacific case, 1 L. Ed. (2) 126 the court said at p. 142 of the L. Ed. Cit.

> "Hence we face the same question as the one we have dealt with in the Western Pacific Case, supra, namely: Does the issue of tariff construc-

> tion, which the Court of Appeals regarded as one for the court, involve such acquaintance with rate-making and transportation factors as to make the issue initially one for the Interstate Commerce Commission, under the doctrine of primary jurisdiction?"

We submit that the factors there involved are not here, i.e., "such acquaintance with rate making and transportation factors." Our sole question is to determine whether the potatoes are "cooked food" or "vegetables, fresh, frozen."

As pointed out in Appellant's brief the courts have dealt with other situations involving much more complicated and technical items than we are dealing with here, without invoking the doctrine of primary jurisdiction. (App. Br. 28-29)

In the *Norge Corp. vs. Long Island R. Co.* case, 77 Fed. (2) 312, cited by Appellant, the court also said at p. 314:

> "It is only where words of the tariff have an ordinary meaning only, and are employed in that sense so that their interpretation is solely a question of law, involving no issue of fact, that a court has jurisdiction in the first instance. (citing)
> In Great Northern Ry. Co. vs. Merchants' Elevator Co., supra, the court held that if the construction of the tariff presented solely a question of law, the court had jurisdiction, but if it involved a question of fact or of discretion in technical matters, the Commission had exclusive jurisdiction."

We wish to emphasize, what so many courts say, "where there is no issue of facts to be determined" there is no need to refer the matter to the Interstate Commerce Commission.

CONCLUSION

We respectfully submit that the trial court's judgment should be sustained for the reason that its Findings of Fact are well supported by satisfactory evidence, and that they should not be reversed except for clear showing of error, that the Findings entered are clear and convincing and the only logical conclusion to be drawn from the Agreed Facts and the amplifying testimony. That this is not an appropriate case to invoke the doctrine of primary jurisdiction for the reason we are dealing with a common, ordinary commodity and the Court will take judicial notice of the nature and use of the product. The most compelling reason is the fact that these potatoes must be cooked before they are served by the housewife or the institutional user.

We believe the evidence, the facts, and the law are clear in this case and following the authorities cited the judgment should be affirmed.

Respectfully submitted,
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Attorney for Appellee.